

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF LOUISIANA

JEFFERSON RADIATION	]	
ONCOLOGY, L.L.C.,	]	
Plaintiff	]	
v.	]	CIVIL ACTION NO.: 2:15-cv-1399
	]	JUDGE: BERRIGAN
ADVANCED CARE SCRIPTS, INC.,	]	MAGISTRATE: KNOWLES
Defendant / Third Party Plaintiff	]	
v.	]	
	]	
WESTFAX, INC.	]	
Third-Party Defendant	]	

ANSWER, AFFIRMATIVE DEFENSES AND COUNTER CLAIMS  
OF THIRD-PARTY DEFENDANT WESTFAX, INC. TO DEFENDANT'S  
THIRD-PARTY COMPLAINT

Third-Party Defendant, Westfax, Inc., (hereinafter, "Westfax"), by and through its undersigned counsel, hereby provides its Answer to the Third-Party Complaint (the "Third-Party Complaint") of Defendant, Advanced Care Scripts Inc. ("ACS"), and answers such allegations as follows:

Westfax is a fax broadcaster and provides fax broadcasting services strictly in accordance with TCPA and the Regulations promulgated thereunder for fax broadcasters. Westfax has agreements with all of its customers, including ACS that documents this. Except as otherwise expressly stated, Westfax denies each allegation in the Third-Party Complaint, including without limitation, any allegations contained



in the preamble, headings, subheadings, or any other text that is not contained in a numbered paragraph, and Westfax specifically denies any liability to ACS, Plaintiff or any of the class that Plaintiff purports to represent.

## INTRODUCTION

1. Westfax denies the allegations asserted in Paragraph 1 of the Third-Party Complaint including in particular any representations and instructions alleged to have been made by Westfax to ACS, and even more particularly, what specific opt-out language ACS should use in ACS's fax transmissions and whether the opt-out language ACS used was deficient. Westfax was not involved in any manner with the content of ACS's facsimiles and the opt-out notice is a part of the content of its facsimiles. The Westfax website ACS refers to in this Paragraph and the context of helping customers "design and implement a successful campaign" does not include or involve Westfax in the content of ACS's facsimiles (including the language of its opt-out notices) or how to comply with the TCPA facsimile advertising rules, all of which is stated in Westfax agreements with ACS and on Westfax's website. To the extent a response is required, Westfax admits it offers all of its customers, including ACS, as permitted by the TCPA and FCC a free toll free removal service. Westfax denies it arranges and controls the opt-out mechanism or that such mechanism has any relationship to ACS's claims against Westfax. The free toll free removal service may

be used by recipients after fax broadcasts and is separate and distinct from the transmission of the senders' facsimiles, the content of the facsimiles (including the opt-out notice language) and the list of recipients the senders give Westfax to transmit their order to. The removal service is not "arranged"; it is automatic and self-executing. Callers call the removal numbers, follow the prompt to enter their fax numbers to be removed and the toll free removal service automatically suppresses the removed numbers from future transmissions by the customers. Westfax admits it owns the removal numbers assigned to its customers, and the toll free removal system stores the removal numbers for the benefit of Westfax customers. Westfax denies it controls the customers' removal list. Westfax asserts the toll free removal service it provides is expressly permitted by the TCPA and its Regulations and denies ACS has any claims against Westfax for the free toll free removal services provided to ACS.

2. Westfax denies the allegations asserted in Paragraph 2 of the Third-Party Complaint, including it owed a duty to ACS to establish, administer, and maintain its fax transmission services in accordance with all applicable laws. The TCPA, Westfax's agreements with ACS, and Westfax's website all expressly negate any such duty, impose such duty solely on ACS, and repeat what the TCPA provides that the sender (ACS) is solely responsible for its facsimiles and complying with all laws including the TCPA. Westfax asserts its agreement with all of its customers, including ACS, is that

Westfax is the fax broadcaster, and is not the sender, advertiser or otherwise involved with the content contained in the customers' facsimiles and the customers agree to fully comply with all laws including the TCPA. Westfax further denies ACS relied, justifiably or otherwise, on Westfax's instructions, representations and expertise and no such instructions or representations were made. Westfax further denies it is anything other than a fax broadcaster and denies it has any responsibility for selecting the opt-out language included in ACS's faxes.

### **STANDING AND JURISDICTION**

3. Westfax denies the allegations asserted in Paragraph 3 of the Third-Party Complaint, including that this Court has supplemental jurisdiction over this Third-Party Complaint and ACS's claims in its Third-Party Complaint against Westfax are related to Plaintiff's claims so as to form part of the same case or controversy. Westfax expressly reserves the right to file such motions as may be appropriate to contest such jurisdiction and/or ACS's right to join Westfax as a third-party defendant until a more thorough review of the facts and circumstances have been completed by Westfax.

### **THE PARTIES**

4. Westfax lacks sufficient knowledge or information to admit or deny the allegations set forth in Paragraph 4 of the Third-Party Complaint and, on that basis, denies the allegations.

5. Westfax lacks sufficient knowledge or information to admit or deny the allegations set forth in Paragraph 5 of the Third-Party Complaint and, on that basis, denies the allegations.

6. Westfax admits the allegations set forth in Paragraph 6 of the Third-Party Complaint.

### **FACTUAL BACKGROUND**

7. Westfax lacks sufficient knowledge or information to admit or deny the allegations set forth in Paragraph 7 of the Third-Party Complaint and, on that basis, denies the allegations.

8. Westfax lacks sufficient knowledge or information to admit or deny the allegations set forth in Paragraph 8 of the Third-Party Complaint and, on that basis, denies the allegations.

9. Westfax lacks sufficient knowledge or information to admit or deny the allegations set forth in Paragraph 9 of the Third-Party Complaint and, on that basis, denies the allegations. However, Westfax admits ACS began using Westfax's fax

broadcasting services around 2008 but denies ACS relied upon Westfax to ensure the proper opt-out language was included in all fax transmissions, consistent with the requirements of the TCPA.

10. Westfax denies the allegations asserted in Paragraph 10 of the Third-Party Complaint, including it owed a duty to ACS to establish, administer, and maintain its fax transmission services in accordance with all applicable laws including the TCPA. Westfax further denies ACS relied, justifiably or otherwise, on Westfax's representations and expertise in fax broadcasting and no such representations were made.

11. Westfax denies the allegations asserted in Paragraph 11 of the Third-Party Complaint including the allegation that Westfax controlled the opt-out mechanism. The opt-out mechanism is not a "mechanism" and is not a part of the opt-out notice or used by Westfax or ACS for fax transmissions. The free automated toll free removal service may be used by recipients after fax broadcasts and is separate and distinct from the transmission of the senders' facsimiles, the content of the facsimiles (including the opt-out notice language) and the list of recipients the senders give Westfax to transmit their order to. Westfax asserts the toll free removal service it provides is expressly permitted by the TCPA and its Regulations and denies ACS has any claims against Westfax for the free toll free removal services provided to ACS.

Westfax further denies ACS's unsupported allegation that Westfax's services were to include use of opt-out language compliant with applicable laws. Westfax's agreement with ACS and all of its customers is, and its website expressly states, Westfax is acting as a fax broadcaster and its services are only for fax broadcasting. Westfax billed ACS and ACS paid Westfax solely for successful transmissions and for no other services. Westfax further asserts ACS misstates the toll free number initially assigned to ACS as a part of the free toll free removal service 800-841-3020 ext. 54060 and the subsequent update of the toll free removal service and issuance of a new toll free removal number to ACS of 877-573-7105 to be anything other than a switch of the numbers for ACS to use as a part of the free toll free removal service.

12. Westfax denies the allegations asserted in Paragraph 12 of the Third-Party Complaint including, in particular, the allegation that Westfax reviewed the contents of the notice. Westfax admits it offers its customers, including ACS, the option to send a test fax. However, the test fax was only the sending of the notice ACS sent to Westfax "as is" back to ACS at the fax number ACS provided to Westfax. A test fax is automatic and does not involve any review or other involvement by Westfax with the content of ACS's facsimile or otherwise. Westfax denies it reviewed the content of ACS's facsimiles or the lists of recipients ACS requested Westfax to send the facsimiles to. Westfax denies the allegation that "On at



least one occasion in approximately 2008, a Westfax representative informed ACS that TCPA opt-out language was required and provided the language that ACS adopted for use in all subsequent notices sent by Westfax.” Westfax lacks sufficient information or knowledge as to whether technical corrections, such as fitting the image so that it could be transmitted, occurred but such technical activities, if any, are not violations of the TCPA and have nothing to do with reviewing the contents of a facsimile or providing any content for the facsimile, including opt-out language. As asserted above, Westfax admits it assigned ACS and its other customers, new toll free removal numbers as a part of its free toll free removal services but denies the issuance of new numbers involved any change to the opt-out language or any instruction or other involvement with respect to the language of the opt-out notice. At no time did Westfax develop ACS’s opt-out language or otherwise become involved with ACS.

13. Westfax denies the allegations asserted in Paragraph 13 of the Third-Party Complaint including the allegations Westfax’s website contained any such representations or descriptions or that Westfax made any “implied representations”.

14. Westfax denies the allegations asserted in Paragraph 14 of the Third-Party Complaint including the allegations that Westfax drafted ACS’s opt-out language, is responsible for the faxes it broadcasted for its customer pursuant to its



orders and ACS was unaware of any potential issue until Plaintiff brought this action against ACS in April 2015.

### **FIRST CLAIM FOR RELIEF**

#### **Contribution and Indemnity**

15. Westfax incorporates its responses to Paragraphs 1 through 14, inclusive, of ACS's Third-Party Complaint, as if fully set forth. Westfax denies the allegations contained in Paragraph 15 of the Third-Party Complaint and further denies ACS is entitled to any of the relief prayed for in the First Claim for Relief. In particular, Westfax denies that any liability ACS may have to Plaintiff would be a direct and proximate result of any Westfax action or omission.

### **SECOND CLAIM FOR RELIEF**

#### **Fraud / Fraud in the Inducement**

16. Westfax incorporates its responses to Paragraphs 1 through 15, inclusive, of ACS's Third-Party Complaint, as if fully set forth. Westfax denies the allegations contained in Paragraph 16 of the Third-Party Complaint and further denies ACS is entitled to any of the relief prayed for in the Second Claim for Relief. In particular, Westfax denies providing ACS with specific opt-out language, making any representations, offering any guidance and assuming any responsibility for the content ACS solely created, the lists solely selected by ACS and the orders sent to Westfax to

fax broadcast. There is no showing that Westfax was aware of the FCC rules and applicable laws or that it had any duty to discuss or communicate anything related thereto to ACS. Westfax's agreements with ACS and its website expressly provided otherwise and stated it was ACS's duty to comply with all laws including the TCPA.

### **THIRD CLAIM FOR RELIEF**

#### **Negligent Misrepresentation**

17. Westfax incorporates its responses to Paragraphs 1 through 16, inclusive, of ACS's Third-Party Complaint, as if fully set forth. Westfax denies the allegations contained in Paragraph 17 of the Third-Party Complaint and further denies ACS is entitled to any of the relief prayed for in the Third Claim for Relief. In particular, Westfax denies it had any such duty to ACS or that it falsely represented a material fact and that ACS relied on such a representation, if made, when Westfax's agreements with ACS and its website expressly provided otherwise and stated Westfax was making no such representations and it was ACS's duty to comply with all laws including the TCPA.

### **FOURTH CLAIM FOR RELIEF**

#### **Negligence**

18. Westfax incorporates its responses to Paragraphs 1 through 17, inclusive, of ACS's Third-Party Complaint, as if fully set forth. Westfax denies the

allegations contained in Paragraph 18 of the Third-Party Complaint and further denies ACS is entitled to any of the relief prayed for in the Fourth Claim for Relief. In particular, Westfax denies it had any such duty to ACS or that it recommended opt-out language to ACS when Westfax's agreements with ACS and its website expressly provided otherwise.

## **FIFTH CLAIM FOR RELIEF**

### **Breach of Contract**

19. Westfax incorporates its responses to Paragraphs 1 through 18, inclusive, of ACS's Third-Party Complaint, as if fully set forth. Westfax denies the allegations contained in Paragraph 19 of the Third-Party Complaint and further denies ACS is entitled to any of the relief prayed for in the Fifth Claim for Relief. In particular, Westfax admits it had an agreement with ACS and ACS's fax orders were further subject to the Terms and Conditions on Westfax's website as provided in an email ACS received from Westfax each time ACS sent Westfax a fax broadcast order and prior to fax broadcast of such order. Westfax asserts its agreements and website do not contain an agreement for Westfax to properly administer and maintain fax transmission services to ACS nor do they contain an agreement to assume responsibility for the opt-out language used in all of ACS's fax transmissions and such agreements do not provide that ACS is paying for such services. In fact, the

agreements Westfax has with ACS and Westfax's Terms and Conditions on its website that ACS agreed to each time it sent an order to Westfax provide the opposite. The agreements and website state Westfax is the fax broadcaster, and is not the sender, advertiser or otherwise involved with the content contained in the customers' facsimiles, the customer agrees to fully comply with all laws including the TCPA and the customer is solely liable for opt-out notice compliance and violations. Westfax asserts ACS breached its agreement with Westfax and this is the subject of Westfax's affirmative defenses and counter claims.

#### **SIXTH CLAIM FOR RELIEF**

##### **Unjust Enrichment / Quantum Meruit**

20. Westfax incorporates its responses to Paragraphs 1 through 19, inclusive, of ACS's Third-Party Complaint, as if fully set forth. Westfax denies the allegations contained in Paragraph 20 of the Third-Party Complaint and further denies ACS is entitled to any of the relief prayed for in the Sixth Claim for Relief. In particular, Westfax provided its fax broadcasting services in accordance with its agreements with ACS and in accordance with the TCPA and fully earned the amounts ACS paid to Westfax for such services.

## **SEVENTH CLAIM FOR RELIEF**

### **Colorado Consumer Protection Act**

21. Westfax incorporates its responses to Paragraphs 1 through 20, inclusive, of ACS's Third-Party Complaint, as if fully set forth. Westfax denies the allegations contained in Paragraph 21 of the Third-Party Complaint and further denies ACS is entitled to any of the relief prayed for in the Seventh Claim for Relief.

### **PRAYER FOR RELIEF**

"WHEREFORE" paragraph: Westfax denies that ACS is entitled to any of the relief prayed for in the Third-Party Complaint; asks that judgment be entered against ACS and in favor of Westfax; asks that Westfax be awarded its attorneys' fees and costs incurred in this action, and any other amounts recoverable under law; and that this Court grant Westfax such other relief as the Court may deem just and proper.

### **AFFIRMATIVE DEFENSES**

In further response to ACS's Third-Party Complaint and without assuming the burden of proof where it otherwise lies with Plaintiff or ACS, Westfax asserts the following affirmative defenses based upon information and belief:

**FIRST AFFIRMATIVE DEFENSE.** The Third-Party Complaint and each purported action asserted therein fail to state a claim against Westfax upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE. ACS's claims are barred because ACS's claims against Westfax are based upon Plaintiff's claims against ACS and Plaintiff has no valid individual or class claims against ACS.

THIRD AFFIRMATIVE DEFENSE. Plaintiff's claims against ACS do not satisfy the prerequisites of Rule 23 of the Federal Rules of Civil Procedure. Plaintiff has not pleaded an adequate basis for class certification or that class relief or certification is appropriate because the required elements of Rule 23, including but not limited to commonality, typicality and preponderance, are not present in the instant case.

FOURTH AFFIRMATIVE DEFENSE. Westfax was, at all times relevant herein, in full or substantial compliance with its agreements with ACS and with the TCPA and its Regulations with regard to its actions for and its omissions to ACS and its fax broadcasting services and Westfax acted reasonably and within the standard of care imposed upon Westfax under such circumstances.

FIFTH AFFIRMATIVE DEFENSE. ACS's claims are barred in that ACS's liability, if any, is based on its own acts and omissions and whether intentional or negligent ACS failed in its obligation to comply with the TCPA and its duty to send fax ads with consent and/or with a fully compliant opt-out notice regardless of the

actions or omissions of any other party. Under the TCPA and other laws, ACS has no right or ability to rely on any other person to comply with the TCPA.

SIXTH AFFIRMATIVE DEFENSE. To the extent ACS's alleged injuries and/or causes of action arose prior to the applicable prescriptive or statutory period, ACS's claims are barred, in whole or in part, by the applicable statutes of limitations and/or the statute of repose.

SEVENTH AFFIRMATIVE DEFENSE. ACS's cause of action is barred as a result of ACS's failure to assert all of its claims and defenses to Plaintiff's Amended Complaint and to mitigate its damages and/or injury.

EIGHTH AFFIRMATIVE DEFENSE. ACS has waived its right to recover herein, in whole or in part, and by its own actions its claims are also barred by the doctrine of estoppel and by prescription, waiver and laches.

NINTH AFFIRMATIVE DEFENSE. ACS is barred from recovery in that any damage sustained by ACS was the direct and proximate result of the independent, intervening, negligent and/or unlawful conduct of ACS or its agents over whom Westfax has neither control nor responsibility, and not any act or omission on the part of Westfax.

TENTH AFFIRMATIVE DEFENSE. ACS is barred from recovery in that any damage, loss, or liability sustained by ACS must be reduced, diminished and/or



barred in proportion to the intentional or negligent conduct of ACS or persons other than ACS under the principles of equitable allocation, recoupment, set-off, proportionate responsibility, and/or comparative fault.

TENTH AFFIRMATIVE DEFENSE. The agreements Westfax has with ACS limits any liability Westfax may have to the amount charged to the Customer for the particular service performed by Westfax.

Westfax reserves the right to amend its Answer to assert such other, further and additional defenses as may be warranted and otherwise discovered during the pendency of this lawsuit.

### **THIRD-PARTY DEFENDANT'S COUNTER CLAIMS AGAINST ACS**

Westfax, by and through its attorneys of record, hereby files these counter claims against ACS as follows:

#### **FACTUAL BACKGROUND**

1. Westfax commenced its fax broadcasting business in 1999. Westfax provides fax broadcasting services to its customers, including ACS, in the same method and manner and pursuant to a specific policy as updated from time to time. That policy specifically includes an account set up for each customer, a customer agreement signed by the customer and the customer's agreement to be bound by the terms and conditions set forth on Westfax's website.

2. Westfax broadcasts faxes for its customers, including ACS, and offers a free toll free removal service, all as set forth in the written customer agreement and in the terms and conditions on Westfax's website.

3. Westfax charges its Customers for broadcasting their faxes on the basis of the number of pages successfully transmitted. Westfax does not offer and does not charge its Customers for any other services.

### **FIRST COUNTER CLAIM FOR RELIEF**

#### **Breach of Contract**

4. ACS signed Westfax's Customer Agreement when it opened its account in approximately 2008. Thereafter, each time ACS sent in an order to Westfax, prior to performing ACS's order, the Westfax fax broadcasting platform automatically sent ACS an email that said by sending in this order you agree to Westfax's Terms and Conditions on its website. The Customer Agreement and Westfax's Terms and Conditions expressly state:

- a. Westfax is only the fax broadcaster;
- b. Westfax is not the sender, advertiser or otherwise involved with the content contained in the Customer's fax broadcast communication;
- c. The Customer acknowledges and agrees it will comply with such laws, rules and regulations including in particular the TCPA;

- d. The Customer agrees to fully release and discharge Westfax from any violation of any law or regulation, statement or representation made by Westfax and any unlawful act or omission or other wrongdoing, not to bring suit or any other claim against Westfax on account of its services, statements and representations to the customer and such laws and to fully defend, pay any damages and hold Westfax harmless from any violations of such federal, state and local laws, rules and regulations;
- e. The Customer is already aware without Westfax's involvement or advice that the TCPA and FCC state: 3. The TCPA and the FCC's rules include but are not limited to these requirements: a. Sending facsimile advertisements only to those recipients the sender has express consent or permission to send to; b. Including an "opt-out" notice conspicuously on the first page of the facsimile advertisement. The opt-out language must state: "The recipient is entitled to request that the sender not send any future unsolicited advertisements to its facsimile advertising machine. Failure to comply within 30 days from the date the request is properly made is unlawful. 800 \_\_\_\_\_ is the telephone number and \_\_\_\_\_ is the fax number for the recipient to transfer such request";

- f. The Customer has not received from or relied upon Westfax or any of its employees and agents any information or advice about the TCPA and the FCC Regulations implementing the TCPA or any other similar state law. By law, Westfax does not provide any advice on how to comply with the facsimile advertising rules or any legal aspects of sending facsimile advertisements. Westfax does not provide data (e.g. lists) or any content (including the opt-out notice) for the Customer's messages.
- g. The Customer is liable for all costs and expenses, including reasonable attorney fees, incurred by Westfax for any violations of the Terms and Conditions;

5. As a result of ACS's actions and Plaintiff's Complaint alleging ACS's violation of the TCPA, ACS has breached its contract with Westfax multiple times, including but not limited to, ACS's agreement: (1) not to violate the TCPA; (2) to fully release and discharge Westfax; (3) not to not bring suit or any claim against Westfax; (4) to fully defend, pay any damages and hold Westfax harmless; (5) that Westfax does not provide advice, or make statements or representations; and (6) that ACS was unaware of the opt-out notice requirement and Westfax provided the opt-out notice language to ACS.

## SECOND COUNTER CLAIM FOR RELIEF

### Frivolous Lawsuit

6. ACS's claims are frivolous, vexatious, and not brought in good faith. Westfax demands as a sanction reimbursement of all costs and attorneys' fees relating to the defense of these claims.

WHEREFORE, Westfax respectfully requests that this Court enter judgment on its counter claims against ACS as follows:

(A) Award judgment in favor of Westfax and against ACS for its breach of contract, frivolous lawsuit and corresponding abuse of process in an amount to be determined at trial; and

(B) Grant any other relief that this Court may deem just and proper.

### SCHEXNAYDRE LAW FIRM

BY: /s/ David J. Schexnaydre  
DAVID J. SCHEXNAYDRE, T.A. (#21073)  
2859 Highway 190 • Suite 212  
Mandeville, Louisiana 70471  
Telephone: (985) 292-2020  
Fax: (985) 235-1089  
Email: [david@schexnaydre.com](mailto:david@schexnaydre.com)  
Counsel for Westfax, Inc.

### CERTIFICATE OF SERVICE

I hereby certify that on this 29<sup>th</sup> day of September, 2015, I presented the foregoing pleading to the Clerk of Court for filing and uploading to the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ David J. Schexnaydre  
DAVID J. SCHEXNAYDRE



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S

# Customer Agreement - Terms and Conditions

## A. Agreement

This Agreement is entered into between WestFax, Inc. ("WestFax") and you (the "Customer" or "User"), and covers the terms and conditions of your use of WestFax Services ("Services"). You agree the Services that WestFax provides to you are subject to the Agreement and its Terms and Conditions. The Customer Agreement and its Terms and Conditions are collectively referred to hereinafter as the "Terms"). Each time you check "I ACCEPT" before using the Services you are further agreeing to the Terms and to be bound by the Customer Agreement.

WestFax may revise the Terms at any time by posting revised Terms on the WestFax web site ("Site") or by sending information regarding the amendment to the email address you provide to WestFax. You are responsible for regularly reviewing the Site to receive an update of the Terms. You shall be deemed to have accepted these updates by continued use of the Services after the changes have been posted. The most current version of the Terms can be reviewed at [WestFax Agreement - Terms and Conditions](#) and at the bottom of our Site. This Agreement may not be amended by Customer except in writing signed by WestFax.

The Customer Agreement and Terms and Conditions comprise the entire agreement between WestFax and you regarding the subject matter of this Agreement.

## B. Services Description and Charges

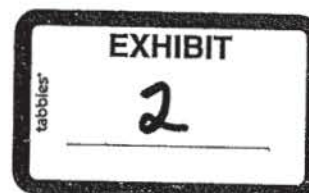
On its Site, WestFax provides you with access to a variety of fax, voice, email and messaging services. "Services" are defined as any and all services provided by WestFax to you either now or in the future. The Services, including any updates, enhancements, new features, and/or the addition of any new web properties, are subject to these Terms. The most current versions of the Services and the charges for the Services can be reviewed by clicking on the hypertext links:

Fax Broadcast allows you to send a single fax to more than one person at the same time.

### Fax Broadcast

FaxForward allows you to receive AND send faxes with your email account.

### FaxForward





The inbound (receipt) of faxes consists of providing you with toll free or local telephone number from which you may receive facsimile messages that are routed into your email, FTP site or WestFax FTP site.

The outbound (sending) of faxes consists of opening your email, attaching to your email the document you wish to send and entering the facsimile number(s) of the person(s) you wish to fax the document to in the "to field". The attachment is sent to the fax machine(s) with the number(s) you entered in the "to field".

Your FaxForward Service will be connected to the email account you provide to Westfax.

#### **FaxForward 30 Day Free Trial**

When you sign up for the FaxForward Service you are entitled to try the FaxForward Service on a free, 30 day, trial basis. During the free 30 day trial period, you are entitled to receive and send a total of 500 pages of faxes. If you exceed this total during the trial period you will be charged \$0.05 for every page over 500.

#### **FaxForward Monthly Plan**

The cost of the FaxForward Service (inbound and outbound) is \$8.99 per month. You will be charged for the FaxForward Service on the 1st day of the month for the FaxForward Service for that month. Your first monthly charge will reflect the portion of the month remaining after your 30 day free trial period expires, the first full month of the FaxForward Service and any charges you incurred from the use of the FaxForward Service during the trial period (e.g. over 500 pages). Thereafter, you will be charged \$8.99 per month plus any other charges you incur during the month.

During each month you are entitled to receive and send a total of 500 pages of faxes. Your account is administered by giving you a 500 page credit at the beginning of each month (and a proportionate amount of pages for the portion of the month remaining after the free 30 day trial period expires) and deducting from such credit all pages received and sent by you during the month. If you exceed this total during any month, you will be charged an additional \$0.05 for every page over 500. If you do not use all 500 pages, any remaining or unused pages expire at the end of each month. The FaxForward pages have no monetary value and do not roll over to the next month. There is no refund for any unused portion of the FaxForward Service.

#### **FaxForward Storage and Search**

Fax messages received and sent by you will be stored and displayed on the Site for 60 days after the fax is received or sent or until your account is terminated, whichever occurs first. These faxes are searchable by the dates sent and received.

#### **Modification of Features and Liability**

WestFax reserves the right to reduce the number of days your faxes will be stored and the number of faxes stored and to otherwise modify or remove the storage and/or searchable features of the FaxForward Service altogether. You agree Westfax has no responsibility or liability for any failure or malfunction of your email account, the storage or searchable features, the deletion of any faxes, the loss of the ability to use the FaxForward Service or portions thereof or the inability to search for or obtain fax messages. The User assumes full responsibility for the content of any emails and faxes and the transmission of and receipt by third parties of your emails and faxes. If WestFax believes any emails or faxes sent as a part of the FaxForward Service violate or may violate any federal, state or local statute, law or regulation, or User has



otherwise breached any portion of the Terms, WestFax may remove your emails and faxes and/or deactivate any links to the Services without notice to you.

### C. Sign Up

You may sign up for any of the Services online at [FaxForward Sign Up](#) and follow the simple steps which include your name, address and other contact information, billing information and a credit card. When you sign up, Westfax will verify your credit card information by submitting a \$0.00 authorization to your credit card issuer.

In order to use the FaxForward Service on a free 30 day trial basis you must first sign up for the FaxForward Service.

If you begin but do not complete the sign up process for the Services, you authorize WestFax to contact you to assist you with the sign up process, to discuss the Services or to answer any questions you may have with respect to the Services.

### D. Ownership

All programs, services, processes, designs, software, technologies, trademarks, trade names, inventions and materials comprising the WestFax Services are wholly owned by WestFax and/or its licensors and service providers except where stated otherwise.

You understand and agree that you are not the owner of any WestFax Services including any fax or voice number ("WestFax Number") assigned to you by WestFax. Ownership of any such WestFax Number is vested solely in WestFax. WestFax is the customer of record for all WestFax Numbers. WestFax may assign such number to you for your use during the time of this Agreement. You understand and agree that following the termination of your WestFax account for any reason, such WestFax Number may be re-assigned immediately (although there may be a transition period) to another customer, and you agree that WestFax will not be liable for damages (including consequential or other damages) arising out of any such re-assignment, and you therefore waive any claims with respect to any such re-assignment, whether based on contractual, civil wrongs, or other grounds, even if WestFax has been advised of the possibility of damages.

You further understand and agree that WestFax may from time to time need to change the WestFax Number assigned to you due to circumstances outside or within WestFax's control. You agree that WestFax will not be liable for damages (including consequential or other damages) arising out of any such change in the WestFax Number assigned to you, and you hereby relinquish any claims with respect to any such change, whether based on contractual, civil wrongs, or other grounds, even if WestFax has been advised of the possibility of damages.

WestFax's rights to the WestFax Numbers include the right to "port" the WestFax Numbers. WestFax is not a telephone company and is not under any legal obligation to permit you to port any WestFax Numbers. You agree not to transfer or attempt to transfer any WestFax Number assigned to you to any other telephone carrier or other person. If you violate this provision, you agree to immediately transfer back the WestFax Number to WestFax, pay WestFax for any costs and damages caused by such transfer and take any and all other actions as may be requested by Westfax.

Notwithstanding the above, if you ported in any telephone number in connection with your use of the FaxForward Service, you may port out the telephone number when you terminate your account: (1) by giving WestFax written notice within 30 days after your account is terminated that you intend to port out your telephone number; (2) your

telephone carrier provides WestFax's telephone carrier with a signed porting request; (3) you have paid for all of your charges for the Services; and (4) you pay WestFax its administrative fee of \$20.00 to cover its costs of processing the transfer. You understand and agree that delays, technical problems and processing issues may occur during the porting out period and this may prevent your new carrier from porting your number to it. Westfax is not responsible or liable for any part of the process where your telephone number is ported.

You agree that you are not authorized to charge any Services provided to you or at your request to the WestFax Number assigned to you by WestFax and that you will not request or otherwise cause any third-party service provider to charge any of its services to such number. You are responsible for any such charges, and any such charges will give WestFax the right to immediately terminate your WestFax account without notice.

#### **E. Use of Services / Customer Responsibilities**

By using the Site and Services, you acknowledge that you have read, understood and agreed to be bound by these Terms. If you do not agree with these Terms, you will not be granted permission to log into this Site and/or utilize our Services. By accepting these Terms, you acknowledge that you agree to represent and warrant that the information provided by you in the Account Set-up is true and correct in all respects and to promptly update such information if it changes and to pay all charges to your account that you incur as a result of use of the Services through your account.

You represent and warrant that you are at least 18 years of age. You attest that you possess the legal right and ability to enter into this Agreement. If you are representing a corporation you warrant that you have the authority to bind the corporation. You agree to be financially responsible for your use of WestFax Services (as well as for use of your account by others, including minors) and to comply with your responsibilities and obligations as stated in these Terms.

You must acquire and pay for all equipment and third-party services (such as but not limited to telephone and computer equipment) required for you to access and use the Services; maintain the security of your password and other confidential information relating to your account; and be responsible for all charges resulting from use of your account, including unauthorized use prior to your notifying WestFax of such use and taking steps to prevent its further occurrence. You may not sell, resell, rent or lease the use of the Services.

#### **F. Charges**

You agree to pay all charges for your use of WestFax Services according to the payment plan applicable to your Service. WestFax reserves the right to prospectively change prices or institute new charges for access to or use of WestFax Services.

Charges for Services may include activation, recurring subscription and usage fees. Your activation and recurring monthly subscription fees are payable in advance and are COMPLETELY NON-REFUNDABLE. For Broadcast Fax Service, usage charges are charged as and when such charges are incurred or by accumulating such charges (at the sole discretion of WestFax) in accordance with the usage rates that apply to the Broadcast Fax Service you use. For FaxForward Service, usage charges are charged on the 1st day of each month in accordance with the monthly rate that applies to the FaxForward Service you use. Overage and other charges may be applicable as well.

Your plan may include a monthly allowance of free or set amount of faxes, phone calls, emails, or contacts. In the event that you have exceeded your plan's limit you will be automatically charged usage fees for each fax, call, email or contact in excess of your plan's limit. Unused allowances and credits expire and are not transferrable from month to month.

Payment of your WestFax account balance is due and payable according to your plan for the Services you choose to use. All FaxForward Service is due on the 1st of each month and is payable by credit card at such time. If your WestFax Broadcast Fax Service is not paid by credit card and instead a qualified business account is approved by WestFax for corporate billing, charges will be accumulated, identified by account number and invoiced accordingly. Charges for qualified business accounts for Broadcast Fax Service are subject to the Terms. Any failure to pay the charges is violation of this Agreement and grounds for termination of your account by WestFax.

If the payment method for your WestFax account is by credit card and payment is not received by WestFax from the card issuer or its agents, you agree to pay all amounts due upon demand by WestFax each time you use WestFax Services or allow or cause WestFax Services to be used. You agree and reaffirm that WestFax is authorized to charge your designated card. Your card issuer's agreement governs your use of your designated card in connection with WestFax Services, and you must refer to such agreement (not this Agreement) with respect to your rights and liabilities as a cardholder.

You agree that WestFax may submit charges for your usage fees and recurring monthly and any other subscription fee without further authorization from you, until you provide prior notice (in accordance with WestFax' verification procedures, as may be established by WestFax from time to time in its discretion) that you have terminated this authorization or wish to change your designated card. Such notice will not affect charges submitted before WestFax reasonably could act on your notice. If you have any question regarding any charges that have been applied to your account, you must contact WestFax' Customer Service within thirty (30) days of the charge date. Failure to do so will waive your ability to dispute such charges. Failure to use your account will not be deemed a basis for refusing to pay any charges submitted by WestFax in accordance with this Agreement.

WestFax may amend the pricing, charges and other features of the Services at any time either by posting the amendments and changes on the Site, or by sending information regarding the amendments and changes to the email address you provided. You are responsible for regularly reviewing such amendments and changes including pricing information. Continued use of the Services, or non-termination of your account after changes are either posted or emailed to you constitutes your acceptance of the Services as modified.

#### **G. Personal Information Privacy and Protection**

See the Privacy Policy hypertext link [WestFax Privacy Policy](#) and also located at the bottom of the WestFax Site for disclosures relating to the collection and use of your personally identifiable information.

#### **H. Data Storage and Protection**

While your account, is active WestFax will store customer information sent and received through your WestFax account for sixty (60) days, in each case measured from the date of receipt of such information. WestFax shall maintain administrative,

technical and physical safeguards to protect the security, confidentiality and integrity of customer information in its possession. Customer acknowledges that WestFax may change its practices and limitations concerning storage and protection of information, at any time and that notification of any such changes will be posted on the Site. Customer further agrees that this feature is provided as a convenience to Customer only and WestFax has no responsibility or liability whatsoever for the deletion, loss, disclosure of, or failure to store or protect any information and/or other communications maintained, received or transmitted by use of the Services.

#### **I. The Internet**

Customer acknowledges and agrees that the predictability of the Internet is such that WestFax cannot and does not guarantee access to the Site or its Services. WestFax may, from time to time, temporarily suspend your access without any prior notice to you. Moreover, you understand and agree that WestFax will not be liable for any direct, indirect, incidental, special or consequential damages relating to any pranks, hoaxes, viruses, bugs or any other form of technological failure, natural disaster or security breach that may prevent or interrupt access to or use of the Site and Services thereon, or cause information or communications received and transmitted through WestFax's Services to be publicly disseminated or otherwise misdirected, or for any other mistake, omission, deletion of information or communications or error.

#### **J. Account, Password and Security**

To open an account you must complete the Sign Up process by providing WestFax with current, complete and accurate information as requested on the Account Set Up Form. You agree to notify WestFax promptly of any changes to this information as required to keep it current, complete and accurate. You will also be assigned a user name and password. Please remember that your user name and password are unique to you and should not be communicated to any other person. You may change your password on the Site. You are entirely responsible for maintaining the confidentiality of your user name, password and account information. By accepting this Agreement, you represent and affirm to WestFax that you will not communicate your user name and/or password to any unauthorized user. You agree to assume sole responsibility for all charges and harm resulting from the use of the user name and password by anyone other than yourself.

You agree to notify WestFax immediately of any unauthorized use of your account or any other breach of security. WestFax will not be liable for any loss that you may incur as a result of someone else using your password or account, either with or without your knowledge. However, you could be held liable for charges and losses incurred by WestFax or another party due to someone else using your account or password. You may not use anyone else's account at any time, without the permission of the account holder.

#### **K. Prohibited or Unlawful Use**

As a condition of your use of the Services, you agree not use the Services for any purpose that is unlawful or prohibited by these Terms in the Customer Agreement. You may not use the Services in any manner that could damage, disable, overburden, or impair any WestFax server, or the network(s) connected to any WestFax server, interfere with the Services or any other party's use of the Services. You may not attempt to gain unauthorized access to any Services, other accounts, computer systems or networks connected to any WestFax server or to any of the Services, through password mining, hacking or any other means. You will not use or register the name



WestFax or any other trade name or trade mark of WestFax without express, prior permission and you will not obstruct the identification procedures used by WestFax in the Services.

You represent and agree that the information submitted for receipt and transmission through the WestFax network for WestFax Services is for lawful purposes only and that the receipt and transmission of messages or files is not in violation of any federal, state, or local laws and regulations including, without limitation, the provisions of the Telephone Consumer Protection Act of 1991 and the Junk Fax Prevention Act of 2005 which generally prohibit the sending of unsolicited facsimile advertisements. You will not encourage or participate in conduct that would amount to a criminal offense, infringe third party rights, give rise to civil liability or otherwise violate any local, state, national or other law or regulation. You agree to comply with all applicable laws, regulations, or conventions including those related to Do Not Call provisions, faxing, telemarketing, email, including email marketing, anti-spam, anti-phishing, data privacy, international communications, and export of technical or personal data. You may not use the Services to upload, post, reproduce, download or distribute, in any way, any information, software or other material protected by copyright or any other intellectual property right without first obtaining the permission of the copyright owner. You should consult with an attorney regarding these laws and regulations. You agree to indemnify and hold WestFax, its officers, employees and agents harmless for any claims, damages, costs and expenses that WestFax incurs due to defending, protecting and enforcing its rights, including, without limitation attorney's fees incurred to defend, protect and enforce its rights. This includes, without limitation, attorney's fees and costs incurred to defend an alleged violation of the above laws or regulations by Customer and/or WestFax, its officers, employees and agents. In such an event, WestFax shall be defended by attorneys of its choice and at Customer's expense.

You are fully responsible for the form and content of anything received and for your transmissions sent using the Services and agree and acknowledge that you are the creator of all content sent, and that WestFax is not the creator, author or publisher of any content and WestFax does not review or participate in any manner with respect to your form and content or rent, sell or provide data or lists of any kind. WestFax's Services are a medium for you to send and receive information of your own choosing using the WestFax Services.

WestFax prohibits the use of the Services or its Site (or any other web site) by any person or entity that encourages, promotes, provides, sells or offers to sell products or content relating to illegal or fraudulent activities (or services related to the same) including but not limited to: illegal drugs; pirated computer programs; instructions on how to assemble or otherwise make bombs, grenades or other weapons; material that exploits children, encourages violence, spam, obscenity; and similar activities. This is not a complete list, and WestFax, in its sole discretion, may determine whether your use is prohibited and its determination shall be final, binding and irrefutable for all purposes under this Agreement. WestFax will terminate your use of its Services if WestFax determines such prohibited content or use is in violation of this Agreement. Any information stored on the WestFax servers deemed to be unlawful or a violation of this Agreement or legal and regulatory requirements may be deleted at any time by WestFax without notice. WestFax reserves the right to remove any image or other information which violates this Agreement without notice to you. Furthermore, WestFax does not assume liability for claims and causes of action concerning unsolicited faxes and unlawful emails or voice messages sent by you or others using your account, including, but not limited to, those claims and causes of action arising

from the Telephone Consumer Protection Act of 1991, FCC Rules and Regulations, FTC regulations, Junk Fax Prevention Act of 2005 and the Can-Spam Act of 2003.

WestFax reserves the right at all times to disclose any information as WestFax deems necessary or advisable to satisfy any applicable law, regulation, legal process (e.g. subpoena) or governmental request. WestFax reserves the right but is not obligated to review the content of any of your information and messages for compliance with these terms and other legal requirements upon receipt of a complaint. WestFax further reserves the right to take any other action with respect to the Services that WestFax deems necessary or advisable in its sole discretion if WestFax believes you or your information may create liability for WestFax or others, compromise or disrupt the Services for you or other Customers, or cause WestFax to lose (in whole or in part) the services of WestFax internet service providers (ISP) or other suppliers.

You agree to defend, indemnify and hold WestFax and its officers, employees and agents harmless from any and all direct, indirect or consequential claims, losses, damages, judgments, expenses and costs (including any attorney's fees and expenses) arising out of your use of the Services, your violation of the terms of this Agreement, and the receipt and transmission of any of your messages and documents using the Services, or the infringement of any trademark or copyright by you.

#### **L. Limitation of Liability and Disclaimer of Warranties**

The Services are provided "as is" and there are no warranties, representations or conditions of any kind, express or implied, oral or written, arising by statute, common law, the operation of law, course of dealing, dealings of trade or otherwise with respect to any other product or services, documentation or service in connection with or provided here. WestFax does not guarantee the continued availability of the Services or any assumed guarantee or state of sale, acceptable quality, permanence or appropriate application for a specific purpose. No information included in but not limited to marketing statements or materials will be considered a warranty or representation and should not be relied upon and does not obligate WestFax.

WestFax is not responsible in any way for actions, omissions, communications or difficulties outside of WestFax's control.

The aggregate or maximum liability of WestFax, whether civil offense (including negligence, tort or other civil wrong), breach of contract, violation of law (including fundamental breach or failure of an essential purpose), misrepresentation or otherwise in respect of a single occurrence or a series of occurrences, shall in no circumstances exceed the amounts paid by Customer to WestFax with respect to the Service provided in the claim. In no way shall WestFax be liable for any damages caused to the Customer or any third party even if WestFax has been advised of foreseeable possible damages.

#### **M. Unsolicited Marketing**

The receipt and transmission of telemarketing phone calls, unsolicited fax advertisements, emails and text messages are regulated in the United States under the Sales Rule, the Federal Telephone Consumer Protection Act, Junk Fax Prevention Act and the CAN-SPAM Act. Any violation, including unsolicited marketing in violation of such laws, through the use of Services is prohibited and a violation of this Agreement. If you are receiving telemarketing phone calls, unsolicited fax advertisements, emails and texts, and if the telephone call, fax, email or text contains a telephone number, fax number, email address or other contact information to "unsubscribe" from receipt of additional calls, faxes, emails and texts, you may contact them. These opt-out

mechanisms are required to be offered to the recipient in accordance to the Junk Fax Prevention Act and other applicable federal and state laws.

#### **N. Third Party Rights**

This Agreement has been made solely for the benefit of WestFax and the Customer, and their particular successors and allowed assigns. Nothing in this Agreement is intended to bestow any rights/remedies under or by reason of this Agreement on any third party.

#### **O. Governing Law and Jurisdiction**

You agree that these Terms shall be governed by and construed in accordance with the laws of the State of Colorado and you hereby consent to the jurisdiction of such State and agree that all disputes shall be tried in Denver, Colorado. You expressly waive any right, and agree not to have any dispute under the Terms tried by a jury, except where required by law. You also agree to personal jurisdiction and venue in such courts and expressly agree not to contest jurisdiction, venue or authority of such courts.

#### **P. Termination**

If you have a daily, weekly, month-to-month, 30 days or "pay as you go" plan or account you may cancel the Service at any time by calling WestFax Customer Service at 800-473-6208. A customer service representative will assist you with cancelling your account in accordance with WestFax's then existing procedures. Calling WestFax and terminating your plan or account must be complied with before your termination is effective. WestFax will notify you of the effective date of termination.

WestFax shall have no responsibility to notify any third party, including any third party providers of services, merchandise or information, of any suspension, restriction or termination of your account. In such an event, WestFax shall have no obligation to maintain any messages, information or other content in your account or forward any unread or unsent message, information or other content in your account to you or any third party. Any termination of your account shall not relieve you from any amounts owing or any other liability accruing under this Agreement prior to the time that such termination becomes effective.

#### **Q. Severability**

If any provision or portion of the Terms contained in this Agreement shall be held invalid under any relevant laws, such invalidity shall not affect any other provision of this Agreement.

#### **R. Miscellaneous**

This Agreement constitutes the sole Agreement between you and WestFax relating to your use of this Site, the Services and the subject matter hereof, and no representations, statements or inducements, oral or written, not contained in this Agreement shall bind either party. No waiver of any right under this Agreement by WestFax will be deemed to be either a waiver of any other right or provision or a waiver of that same right or provision at any other time. WestFax reserves the right to assign, transfer or delegate any rights and/or obligations hereunder, in part or in whole, without your prior consent. You may not assign, transfer or delegate your rights or obligations stated here, in whole or in part, without WestFax's prior written consent. This Agreement shall be binding upon each party to this Agreement and to



their respective successors and permitted assigns. Any action or claim against WestFax must be brought within one (1) year following the date on which the claim first arose or shall be deemed forever waived. A printed or electronic version of this Agreement and of any related notice given in written or electronic form shall be admissible in any judicial or administrative proceedings based upon or relating to this Agreement to the same extent and subject to the same conditions as other business documents and records originally generated and maintained in printed form.

#### S. Notices

You may send notices to WestFax at 10465 Park Meadows Drive, Suite 200, Lone Tree, CO 80124 USA. All written replies to you shall be sent to the email address that you provide to WestFax in your Account Set Up Form. If your email address changes, it is your responsibility to notify WestFax of the update. Such communication shall be considered received one (1) business day after the email is sent.

#### T. Requests for Documents and Information

In order to protect the privacy interests of its customers and to comply with state and federal law, including the Electronic Communications Privacy Act 18 U.S.C. Section 2701 et seq., ALL requests to WestFax for documents and information relating to its customers must be made in writing and include the express written consent of the customer or be made pursuant to a civil subpoena validly issued by a Colorado or federal court having jurisdiction over the matter and properly served upon WestFax.

A form of consent is accessible at: [WestFax Consent Form](#)

All subpoenas must be served on WestFax, Inc. at 10465 Park Meadows Drive, Suite 200, Lone Tree, CO 80124 prior to any response. Certified mail constitutes a method of service. WestFax reserves the right to request a copy of the complaint and any supporting documentation that demonstrates how the requested documents and information relate to the litigation. Upon receipt of a valid subpoena, WestFax may notify the customer whose documents and information is sought and allow the customer a reasonable period of time to move to quash the subpoena or otherwise respond.

The Electronic Communications Privacy Act prohibits WestFax from disclosing the content of electronic communications pursuant to a civil subpoena. To obtain such content you may wish to contact or serve the customer who has custody and control of such documents and information relating to the account.

Subject to the above, upon receipt of such a request, WestFax will conduct a search for documents and information accessible on its system that are responsive to the request. WestFax only keeps customers' documents and information for a limited period of time. After the search is complete, WestFax will send the person requesting the documents and information the results of the search. WestFax reserves the right to send the results of the search to its customer who may then be compelled to produce them to person requesting the documents and information. To the extent any document located during the search process contains information restricted by law, exceeds the scope of the written request or is otherwise not subject to production, it will be redacted or removed.

WestFax will require a minimum \$250.00 reimbursement for the reasonable costs incurred in processing written requests and responding to subpoenas for documents and information. Checks should be made payable to WestFax, Inc. WestFax reserves the

right to object to any written requests or subpoenas that are vague, overly broad or involve an undue burden. WestFax objects and exercises and retains its rights by objecting to any information it does have to provide.

#### U. Opt-Out Requests

The Junk Fax Protection Act provides that the sender of a facsimile is solely responsible for opt-out notice compliance and solely liable for any violations. A Customer may, however, voluntarily elect to retain a third party to accept opt out requests. This is an ancillary service offered by WestFax, is done automatically and is free of charge. The Junk Fax Protection Act provides that the third party need only accept and forward do-not-fax requests and is not advising, involved, responsible or liable to the Customer or any other party for such services.

#### V. Audit

WestFax has the right to disclose your email address to the owner of the website domain associated with your email address in order to monitor compliance with and enforce the Services limitations. WestFax may audit your use of the Service by giving five (5) days prior written notice of its intention to conduct such an audit at your facilities during normal business hours. If, in its sole discretion WestFax determines that you have violated the limitations on the Services, Westfax may immediately terminate or suspend your Services. You agree to pay WestFax the amount you would have been required to pay for the Services during the period of your non-compliance with the Services limitations and the cost of conducting any audit.

Revision date: 05/08/2014

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